APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988
No. 95-4075

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellees,

v.

RODNEY BOYER, DAN DELL, and SIMON RISK,
Appellants.

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellants,

v.

MULTI-MEDIA KSDK, INC.,
Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: June 10, 1996

Filed: August 16, 1996

Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and ROSENBAUM,* District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Sandra and Dana Parker made claims under 42 U.S.C. § 1983 and under state law against police officers who conducted a search of their home. They made similar claims against a television station whose reporting crew entered the house after the police did. The district court granted summary judgment for the Parkers against three police officers on their fourth-amendment claims and granted summary judgment in favor of the television station. In light of the disposition of the federal claims the district court declined jurisdiction over the supplemental state-law claims. *See Parker v. Clarke*, 905 F. Supp. 638 (E.D. Mo. 1995). The three police officers and the television station appealed to this court. We reverse, on grounds of qualified immunity, the district court's finding of liability against the officers. We affirm the district court's judgment in favor of the television station because the reporting crew was not acting under color of state law when it entered the Parkers' house.

I.

We will summarize the district court's findings of fact, with which the parties seem to have no dispute. A reporter from KSDK, a television station in St. Louis, contacted the St. Louis Police and told them that he was interested in developing a television news story about the police department's efforts to eradicate illegal weapons. Sometime later, the police told the reporter that a weapons investigation was in progress that he might be inter-

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* THE HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota, sitting by designation.

ested in covering. The investigation centered on the activities of one Travis Martin, a man who resided in a house in which Sandra and Dana Parker also lived. Sgt. Simon Risk later informed officer Rodney Boyer that KSDK personnel would accompany him on his shift that night, and KSDK personnel rode to the scene in a police car with Officer Boyer and Officer Dan Dell. After detaining Mr. Martin outside, Sgt. Risk and six other officers, including Boyer and Dell, executed the search warrant at the Parkers' residence. They entered through an unlocked front door, and the KSDK personnel followed the police into the house. Although the police discovered two weapons and several substances believed to be cocaine, no charges were filed against Mr. Martin or anyone else as a result of the search. KSDK broadcast the tapes that it made at the Parkers' residence on several news programs.

As the district court noted, the police did not give the KSDK personnel any instructions or directions before the search, nor did the police impose any limitations on their conduct. Neither the police nor KSDK personnel sought or obtained the Parkers' permission to videotape the search or broadcast the resulting videotape. The district court also noted that the chief of police testified that his department's policy was to require the media to obtain permission to videotape private citizens whose houses were being searched. If such permission had not been obtained, he testified, the supervising officer on the scene was not supposed to allow the media to enter a private residence, because, the chief believed, such an entry would constitute a trespass.

II.

We deal first with the Parkers' claims against the police officers.

Government officials are entitled to qualified immunity from suit for civil damages if their conduct does not violate clearly established federal rights of which a reason-

able person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993). The issue here is whether reasonable police officers would have known that permitting a television crew to enter a house during the execution of a search warrant would violate a clearly established fourth-amendment right. Though we have no case on point, and the Supreme Court has not provided specific guidance on the question, most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it. *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 98 Wis.2d 130, 295 N.W.2d 768 (Wis. Ct. App. 1980). On the other hand, a recent case held that clearly established constitutional law forbids the police to permit the media to enter a home during a search. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd, Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995); *see also Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (clearly established constitutional law prohibited police from bringing a telephone company employee into a home to conduct an independent general search for items not identified in any warrant).

In assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the acts of which the plaintiffs complain. *Harlow*, 457 U.S. at 818-19; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Because both *Ayeni* and *Buonocore* were decided after the police in this case executed their search, those cases cannot weigh in the balance against a finding of qualified immunity. Even if we believed that those two cases were entitled to consideration, they would appear to us to indicate at most only the beginnings of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amend-

ment principles when they allow members of the news media to enter someone's house during the execution of a search warrant. Accordingly, we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional principle of which the police, at the time they executed their search warrant, should have been aware. The district court therefore erred in concluding that the police officers did not enjoy qualified immunity.

III.

We turn now to the Parkers' claims against KSDK.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *Gentry v. City of Lee's Summit*, 10 F.3d 1340, 1342 (8th Cir. 1993). The requirement of state action in suits for alleged deprivation of civil rights "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The injury complained of must have been caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible. *Id.* at 937. The Parkers appear to argue only that KSDK exercised a right or privilege created by the state when they entered the house.

It is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. Th television station was there for reasons of its own and

was engaged in a mission entirely distinct from the one that brought the police to the house. Seizing an opportunity to trespass is not the same as invoking a right or privilege. We agree with the district court that "[a]t most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant," 905 F. Supp. at 642, and that KSDK was not exercising a right or privilege created by the state when it decided to enter the Parkers' home to record the events taking place there. KSDK's entry into the Parkers' house and videotaping the events that occurred there was therefore not an act committed under color of state law. *See Lugar*, 457 U.S. at 936.

IV.

For the foregoing reasons, we affirm the judgment of the district court in part, reverse it in part.

ROSENBAUM, District Judge, concurring specially.

I join the Court's opinion, but write separately to address the constitutional question underlying the issue of qualified immunity. In my view, our jurisprudence demands a first determination of whether the claimed constitutional right, in fact, exists. We have missed this required first step in the qualified immunity analysis.

This court has consistently ruled that, "[i]n order to determine whether a defendant is entitled to qualified immunity, we engage in a two-part analysis." *Manzano v. South Dakota Dep't of Social Servs.*, 60 F.3d 505, 509 (8th Cir. 1985) (citing *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1985)); *see also Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991). "First, we must determine whether the plaintiff has alleged the violation of a constitutional right." *Manzano*, 60 F.3d at 509. In my view, we have neglected this determination. It is not until we have made this required decision that we analyze whether such right

was clearly established at the time of its alleged violation. *Manzano*, 60 F.3d at 509.

I would find, consistent with *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), that police officials executing a search warrant violate a resident's Fourth Amendment rights, when they admit representatives of the public media into a private citizen's home, without first securing the resident's express consent.

Having recognized this right, I would join the court and determine these officers did not violate a constitutional right which was clearly established at the time they allowed the television news crew to enter the Parkers' home.

RICHARD S. ARNOLD, Chief Judge, concurring in part and dissenting in part.

I join all but part III of the Court's opinion. With respect to the issue decided in that portion of the opinion, having to do with whether KSDK's employees were state actors for purposes of 42 U.S.C. § 1983, I respectfully dissent. In my view, the news crew acted in concert with the police in entering the Parkers' home. They were " 'willful participants[s] in joint activity with the State or its agents . . . .' " *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), quoting *United States v. Price*, 383 U.S. 787, 794 (1966). The news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Filed Sep. 19, 1996]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988EMSL/95-4075EMSL

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellees,

vs.

RODNEY BOYER, DAN DELL, and SIMON RISK,
Appellants,

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellants,

v.

MULTI-MEDIA KSDK, INC.,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is merely ordered and adjudged that the judgment of the district court in this cause is

affirmed in part and reversed in part in accordance with the opinion of this Court.

August 16, 1996

A true copy.

ATTEST:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[Mandate issued Sep. 18, 1996]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988/4075EMSL

SANDRA PARKER, *et al.*,
Appellees,

vs.

RODNEY BOYER, *et al.*,
Appellants.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 4, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

[Filed Nov. 6, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

SANDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

ORDER

On October 31, 1995, the Court entered an order and partial summary judgment in which the Court determined as a matter of law that defendants Boyer, Dell and Risk were liable to plaintiffs on their Fourth Amendment claims under 42 U.S.C. § 1983, and that all defendants were entitled to judgment as a matter of law as to all of plaintiffs' remaining claims under § 1983. Defendants Boyer, Dell and Risk have now filed a motion "for certification of judgment as final for purposes of appeal, for clarification of the Court's order and for a stay of proceedings."

In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the ab-

sence of a final judgment."[1] To the extent defendants seek clarification of the Court's October 31 order, the Court now makes explicit what was clear but implicit in the Court's rationale and rulings: the Court deliberately but impliedly rejected the qualified immunity defense asserted by defendants Boyer, Dell and Risk when it denied in part their motion for summary judgment and granted in part plaintiffs' motion for summary judgment.

The instant motion expresses Boyer, Dell and Risk's intention to immediately appeal the denial of qualified immunity. Although such an appeal has commonly been referred to as an "interlocutory" appeal, the Supreme Court's holding in *Mitchell* refers to § 1291, which provides or appeals of final decisions, rather than to § 1292, which governs appeals from interlocutory decisions. As such, the appeal concerning qualified immunity does not require the district court's certification, as does a true interlocutory appeal pursuant to § 1292(b). *See, e.g., Swint v. Chambers County Commission,* 115 S.Ct. 1203, 1209-10 (1995) [contrasting appeal as of right under § 1291 with permissive interlocutory appeal under § 1292(b)]. Although the qualified immunity claim is not waived by defendants' failure to take an immediate appeal, *see Littlewind v. Rayl,* 33 F.3d 985, 986 (8th Cir. 1994) and *McIntosh v. Weinberger,* 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), the appeal of this issue is now available as a matter of right.

Boyer, Dell and Risk also ask the Court to certify as final for purposes of appeal, pursuant to Fed.R.Civ.P. 54(b), the grant of partial summary judgment against them on the Fourth Amendment claims asserted in Counts

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[1] The Court's qualified immunity determination in this case is entirely an issue of law, and not based on a determination concerning the existence of disputed facts for trial, the latter of which would not be immediately appealable under the Supreme Court's recent ruling in *Johnson v. Jones,* 115 S.Ct. 2151, 2159 (1995).

I and V. Summary judgment as to liability only, without a determination of damages, does not allow entry of final judgment on the underlying claims; Rule 54(b) therefore cannot be applied to allow appeal of this determination. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *Pemberton v. State Farm Mutual Auto. Ins.*, 996 F.2d 789, 791 (5th Cir. 1993). Instead:

> [A] judgment for the plaintiff that determines liability for, but does not fix the amount of, damages is appealable solely under 28 U.S.C. § 1292(b), which requires not only appropriate certification by the district court but also application within ten days to the Court of Appeals and that court's grant, in its discretion, of permission to appeal.

Pemberton, 996 F.2d at 791.

The Court will construe the motion as seeking certification for interlocutory appeal of the adverse summary judgment determination under § 1292(b). The Court finds, pursuant to § 1292(b), that its summary judgment determination against defendants Boyer, Dell and Risk involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of this determination may materially advance the ultimate termination of the litigation. On the facts of this case, the substantive Fourth Amendment issue presented is a question of first impression in the Eighth Circuit, satisfying the substantive predicate of the § 1292(b) standard. As for the procedural predicate, in view of the appeal as of right on the qualified immunity issue available to defendants Boyer, Dell and Risk, and the other dispositive determinations dealt with below pursuant to Rule 54(b), this § 1292(b) certification advances the ultimate disposition of the litigation by allowing a unitary appeal of the Court's substantive determinations as to liability. In view of the global nature of the appeals to be taken, the Court will also order pursuant to § 1292(b)

that all district court proceedings be stayed during the pendency of the appeals.

Also before the Court is plaintiffs' motion pursuant to Rule 54(b) for certification of the Court's ruling in favor of defendant Mutli-Media KSDK, Inc. on Counts III and VII of the second amended complaint. The Court's entry of judgment as a matter of law in favor of KSDK on plaintiffs' § 1983 claims is a final determination of the rights and liabilities of both plaintiffs and KSDK on these claims. This determination is, therefore, suitable for application of Rule 54(b), pursuant to which the Court here expressly determines that there exists no just reason for delay as to any appeal. The Court has already entered final judgment on these claims, in the third paragraph of its partial summary judgment of October 31, 1995, but to the extent necessary to satisfy Rule 54(b), here directs that this judgment be construed as final for purposes of appeal.

The Court's October 31 order and partial judgment also finally determined, in favor of defendants, plaintiffs' § 1983 claims against the members of the Police Board and against Lt. Richardson and Sgt. Sloan, and as against defendants Boyer, Dell and Risk on all theories other than the Fourth Amendment. As alluded to above, the Court will take steps to render these determinations final and appealable pursuant to Rule 54(b) as well, so as to allow all of the Court's liability determinations to be appealed at one time. The Court finds that there is no just reason for delay in treating these determinations as final and appealable, and hereby directs that the October 31 entry of summary judgment in defendants' favor, found in the second paragraph of the partial summary judgment, be deemed the entry of final judgment as to these claims.

Finally, on page 3 of its October 31 order, in its recitation of facts undisputed for purposes of the motions for summary judgment, the Court stated that "[t]wo weapons and several quantities of cocaine, in both rock and powder

forms" were seized by the policed uring the search at issue in this case. The Court notes that page one of the narrative police report refers to the seizure of "two white baggies consisting of a white powdery substance believed by [defendant Boyer] to be powdered cocaine" and "two small baggies containing numerous off-white chunks of a substance believed to be 'crack' cocaine." Pursuant to Fed.R.Civ.P. 60(a), the Court will amend the language of page 3 of the order to read: "[t]wo weapons and several substances believed to be cocaine, in both rock and powder forms. . . ."

Accordingly,

IT IS HEREBY ORDERED that the motion of defendants Boyer, Dell and Risk for certification of judgment as final for purposes of appeal is construed as a motion for certification pursuant to 28 U.S.C. § 1292(b) and is granted.

IT IS FURTHER ORDERED that the motion of defendants Boyer, Dell and Risk for clarification of the Court's order of October 31, 1995 is granted, and the Court here makes explicit that its partial denial of their motion for summary judgment was premised on its rejection of their qualified immunity defense.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1292(b), that the October 31, 1995 entry of partial summary judgment in favor of plaintiffs and against defendants Boyer, Dell and Risk on Counts I and V is certified for interlocutory appeal, based on the Court's finding that this determination involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of this determination may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that plaintiffs' motion for an express determination of final judgment pursuant to Fed.R.Civ.P. 54(b) is granted.

IT IS FURTHER ORDERED, pursuant to Fed.R.Civ. P. 54(b), that the October 31, 1995 entry of summary judgment in favor of defendants Clarke, Mischeaux, Padberg, Haar, Boyer, Dell, Richardson, Risk and Sloan as to the remainder of Counts I and V, and in favor of defendant Multi-Media KSDK, Inc. on Counts III and VII, are final and appealable, based on the Court's determination that there is no just reason for delay and that these portions of the October 31, 1995 partial summary judgment be entered as final judgment on these claims.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1292(b), that all proceedings in this Court shall be stayed pending the appeals taken pursuant to this order.

IT IS FURTHER ORDERED that the November 6, 1995 trial setting is vacated, and any motions which remain pending are denied without prejudice to be refiled following the lifting of the stay pending appeal.

IT IS FURTHER ORDERED, pursuant to Fed.R.Civ. P. 60(a), thato n page 3 of the Court's October 31, 1995 order, the fourth sentence of the second paragraph is amended nunc pro tunc to read: "Two weapons and several substances believed to be cocaine, in both rock and powder forms, were seized during the search."

/s/ [Illegible]
United States District Judge

Dated: 11/6/95

[Filed Oct. 31, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

S(NDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

ORDER

Plaintiffs, a mother and her 16-year-old daughter, bring the instant action pursuant to 42 U.S.C. § 1983 and Missouri tort law alleging that defendants—four members of the Board of Police Commissioners of the City of St. Louis, five police officers of the St. Louis Metropolitan Police Department ("SLPD"), and the corporate employer of a local television news crew—are liable to plaintiffs for violation of their civil rights and for invasion of privacy. The action arises from the filming of the execution of a search warrant at plaintiffs' residence and the broadcast of the film on the local television news. The matter is now before the Court on the parties' cross-motions for summary judgment.

Count I of the second amended complaint, a § 1983 claim, is pled against defendants Clark, Mischeaux,

Padberg and Haar (collectively "the Police Board"), and police officers Boyer, Dell, Ricardson, Risk and Sloan, and asserts that the actions of these defendants violated plaintiff Sandra Parker's rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. Count II is Sandra Parker's state law invasion of privacy claim asserted against police officers Boyer, Dell, Richardson, Risk and Sloan. Count III alleges, pursuant to § 1983, that defendant Multi-Media KSDK, Inc. ("KSDK") violated Sandra Parker's rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. In Count IV, Sandra Parker asserts a common law invasion of privacy claim against KSDK. Counts V through VIII are analogous to Counts I through IV, respectively, but are asserted on behalf of plaintiff Dana Parker.

Factual Background

For purposes of the instant motions, the following facts are undisputed. On February 9, 1994, at approximately 9:30 p.m., defendants Boyer, Dell, Risk and Sloan, along with officers Mark Franklin, Keith Washington and Tom Huesgen, all members of the SLPD's Mobile Reserve Unit, entered the residence occupied by plaintiffs at 5242 Maple, St. Louis, Missouri, for the purpose of executing a search warrant for cocaine, hereoin, weapons, currency and drug transaction records on those premises. The officers were accompanied by a KSDK reporter, Randy Jackson, and camera operator, Jeff McCollum, who rode to the scene in a police car with Officers Boyer and Dell. The KSDK cameraman filmed the execution of the search warrant, including footage in which both plaintiffs appear.

Prior to February 9, Randy Jackson of KSDK had contacted persons assigned to the Mobile Reserve Unit, making them aware that he was interested in pursuing a television news story about law enforcement efforts against illegal weapons. He received a call on the morning of February 9, informing him that a weapons investigation was in progress which he might cover. At about the time

of the evening shift's roll call at 6:00 p.m., Sgt. Risk informed Officer Boyer that KSDK personnel would be with Boyer on his shift that night. Sgt. Risk did not know at that time that the warrant for 5242 Maple would be executed that evening. Boyer hoped to execute it that evening, depending on whether he could confirm the presence of the target, Travis Martin, at the address. At approximately 9:00 p.m., Boyer was advised by an informant that Martin was in the house; Boyer then determined to execute the search warrant. The KSDK personnel were not aware until this time that a search warrant was to be executed.

The target of the search warrant, Travis Martin, is a relative of plaintiffs and was then a resident of the house. Martin was detained outside the house before the officers entered to conduct the search. The KSDK personnel entered the house behind the police through the unlocked front door. Two weapons and several quantities of cocaine, in both rock and powder forms, were seized during the search. Travis Martin was arrested for controlled substance and firearm offenses, but no charges were ultimately filed against Travis Martin or anyone else as a result of the execution of the search warrant.

The KSDK personnel were not given any instructions or directions by any police officers, and were not advised by them of any limitations on their location, conduct or filming. No defendant sought or obtained plaintiffs' oral or written permission to film during the search or to broadcast any portion of the film. Neither did either plaintiff, any defendant, or any other person ask or direct the KSDK personnel to leave the premises. Later the same night, the KSDK personnel accompanied some of the same officers during the execution of another search warrant in a different residence. All or part of the film shot by KSDK was broadcast on KSDK's local news broadcasts on February 9, February 10, February 11 and May 6, 1994.

Lt. Richardson, then commander of the Mobile Reserve Unit, arrived at 5242 Maple after the search had been executed. In his deposition, Lt. Richardson testified that officers on the scene told him that occupants of the house had given their permission for the KSDK personnel to be present and to film inside the house. Lt. Richardson further testified that it was his policy to exclude the media from the scene of a search unless the scene was "secure" and the media had obtained permission from those involved. On the night of the search, Lt. Richardson assumed that his policy had been complied with, and that the KSDK personnel had entered the house only after the search was concluded and the house secured, and with the permission of the occupants.

In his deposition, Police Chief Harmon indicated that no formal or written policy existed as to media personnel accompanying police in the performance of their duties. Chief Harmon testified that he or an Assistant Chief would screen most such requests by the media, with input from the department's Public Information Office. In evaluating such a request, Chief Harmon's primary concerns are the physical safety of all involved, the potential for interference in police activity, the proposed subject matter of the media report and its potential effect on the public perception of the police. Chief Harmon's testimony indicated his view that it would be the responsibility of the media personnel to obtain from individual citizens any permission necessary in connection with media coverage, but that if such permission had not been obtained, the supervising officer on the scene should not allow the media to enter a residence, on the ground that such an entry would constitute a trespass.

KSDK and The State Action Requirement of § 1983

In order to recover against KSDK under § 1983, as pled in Counts III and VII of the second amended complaint, plaintiffs must demonstrate that KSDK violated

plaintiffs' constitutional rights under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). As explained by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982):

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Id. at 936-37. *Lugar* provides a two-pronged approach to the state action requirement. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937. Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

KSDK is not alleged to have acted in accordance with a rule of conduct imposed by the State and is not an entity for whom the State is responsible. Accordingly, only the first of the three alternatives of the first *Lugar* prong appears to have any potential application. KSDK's allegedly unconstitutional conduct—entry into plaintiffs' home and the recording and broadcasting of objects and events inside the home—was not, in the words of *Lugar*, "caused by the exercise of some right or privilege created by the State." At most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. The first prong of the two-part *Lugar* test is therefore not met.

A common standard for the application of the second prong of the *Lugar* test is whether the private party acted as "a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966); *see also Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558-59 (8th Cir. 1989). On the undisputed facts presented in this case, the Court is persuaded as a matter of law that KSDK was not a state actor for purposes of § 1983. The Eighth Circuit has held that private party liability under § 1983 requires "a mutual understanding, or a meeting of the minds, between the private party and the state actor." *Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993). The record in this case yields no evidence to support such a mutual understanding or purpose on the part of the KSDK personnel and the police officers who conducted the search. The undisputed evidence indicates that the KSDK personnel had been allowed to "ride along" with Mobile Reserve Unit officers during their shift, and that when, in the course of that shift, a determination was made to execute this particular search warrant, the KSDK personnel came along. The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge.

The entirely distinct purposes of the two groups bolster this conclusion, as well as the Court's ultimate determination that the allegedly unconstitutional conduct was not joint. The KSDK personnel were present for the purpose of gathering news and preparing a report for broadcast. The police were engaged in the conduct of law enforcement activity. The police did not participate in the filming of the objects and events in the house,[1] and the KSDK

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[1] Police officers were filmed conducting the search and making statements to the KSDK reporter; the police, in addition to the plaintiffs, were subjects of the media's coverage. The record discloses no evidence that the police in any way assisted the KSDK personnel in the newsgathering function other than as subjects.

personnel did not participate in the execution of the search. The facts in this case are in this respect easily distinguished from cases in which corporate security guards acted in concert with police in detaining a suspected shoplifter, *see Murray supra*, in which a corporate security guard was invited to accompany the police in executing a search warrant in a home in furtherance of the corporation's own investigation of the same alleged thefts, *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995), or in which private individuals were alleged to have conspired with law enforcement officials in the commission of vigilante acts, *see Price supra*. In the Court's view, then, the conduct of the police and of the media personnel in this case were entirely separate and distinct, and cannot be characterized as joint activity. Because the Court concludes as a matter of law that KSDK did not act under color of state law, KSDK will be granted summary judgment as to Counts III and VII of the second amended complaint.

Police Defendants and the Fourth Amendment Claim

Plaintiffs allege that the conduct of the police in allowing the KSDK personnel into their home and allowing them to film inside the home violated plaintiffs' rights under the Fourth Amendment to be free from unreasonable searches and seizures. In *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), the Second Circuit confronted similar issues arising from a CBS television crew's accompanying Secret Service agents in the execution of a search warrant in the Ayenis' home. Although *Ayeni* was an interlocutory appeal of the district court's rejection of the defendant's qualified immunity defense, the court's discussion plainly indicates its view as to the underlying question whether the facts presented a constitutional violation.

The foundation of the Second Circuit's opinion is its observation that:

> The protection of privacy from encroachment by governmental officers is the " 'principal' object of the [Fourth] Amendment." The home has properly been regarded as among the most highly protected zones of privacy, and "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."

Id. at 684-85 (citations omitted). After a discussion of the express limitations of the warrant as to both its scope and the persons—i.e., law enforcement officers—authorized by it to conduct any search and seizure, the Second Circuit held that:

> Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. . . The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect—the right of privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.

Id. at 686. For these reasons, the court concluded:

> (1) that the Fourth Amendment's prohibition on unreasonable searches forbade Mottola's action in bringing the CBS camera crew into the Ayenis' home, (ii) that the right of the Ayenis to be protected under the Fourth Amendment from an agent's bringing into their home persons not expressly nor impliedly authorized to be there, such as a television camera crew, was "clearly established" at the time

> of the search, and (iii) that Mottola could not with objective reasonableness have believed that his action was consistent with the Fourth Amendment.

Id.

Upon careful consideration of the facts presented in this case, this Court is persuaded to adopt the reasoning of the Second Circuit in *Ayeni*, which, although not directly binding on this Court, is a thorough and authoritative consideration of the substantive Fourth Amendment question here at issue. As alluded to earlier, the rationale and conclusions of *Ayeni* yield not only a determination that the officers responsible for the KSDK personnel's presence in the plaintiffs' home are not entitled to qualified immunity, but yield further the determination as a matter of law that plaintiffs are entitled to summary judgment as to liability on their Fourth Amendment claim under § 1983. The number of defendants in this case requires further consideration as to which officers should be held liable, and whether liability reaches the Board of Police Commissioners.

Individual liability of government officials under § 1983 must be predicated on "a causal connection between the misconduct complained of and the official sued." *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982), quoted with approval in *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986). Supervisory personnel are not liable absent "direct responsibility for the improper action" or "personal involvement of the officer being sued." *Harris*, 677 F.2d at 685 (citations omitted). On the undisputed facts presented by the record, the Court concludes that Officer Boyer and Dell are subject to summary judgment as to liability in plaintiffs' favor. Boyer and Dell were the most directly involved in the determination to allow the media personnel access to the plaintiffs' house during the execution of the warrant. Boyer had obtained the warrant, made the decision when to execute it, and Boyer and Dell together brought the

reported and cameraman to the house in their patrol car. In addition, Sgt. Risk is liable as the supervisory officer who directed Boyer and Dell to allow the KSDK personnel to accompany them on their shift and who was present on the scene to supervise the execution of the search warrant. The facts do not support liability against Lt. Richardson, who was not aware that a search was to be executed or that the media personnel were allowed to accompany the officers executing the search without the occupants' permission, or against Sgt. Sloan, as to whom the facts fail to indicate any direct involvement in the media's presence. The Court will grant plaintiffs partial summary judgment on Fourth Amendment grounds as to individual liability only against defendants Boyer, Dell and Risk on Counts I and V of the second amended complaint. Defendants Richardson and Sloan are entitled to summary judgment on the Fourth Amendment claim asserted in Counts I and V.

To the extent plaintiffs assert any claims against the individual officers in their official capacities, and have asserted claims against the members of the Board of Police Commissioners, plaintiffs seek to impose liability on the City of St. Louis itself. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Such liability is governed by the standards of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), such that liability can be found "only where the municipality *itself* causes the constitutional violation at issue." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). Plaintiffs could prevail on such a claim by demonstrating that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by [the City's] officers." *Monell*, 436 U.S. at 690. The record is devoid of any evidence that there exists an official policy of the City or its police department to allow media personnel access to private premises in which search warrants are executed.

Neither do plaintiffs present evidence of an unwritten policy or custom allowing the practice. The Eighth Circuit has held that municipal liability on the basis of custom requires "a pattern of 'persistent and widespread' unconstitutional practices which became so 'permanent and well settled' as to have the effect and force of law." *Jane Doe A v. Special School District*, 901 F.2d 642, 646 (8th Cir. 1990), *citing Monell*, 436 U.S. at 691. Although the deposition testimony of various defendants indicates that media "ride-alongs" with SLPD officers are a fairly common occurrence, there is no evidence of any incidents of media entry into a home, without the occupant's consent, concurrent with the execution of search warrant, other than the two instances on the night here at issue. The present record therefore supports a determination as a matter of law that plaintiffs cannot establish the type of widespread pattern and practice which is a necesary predicate for official liability. Accordingly, the Court will grant summary judgment on the Fourth Amendment claims asserted in Counts I and V to the members of the Police Board and to all other defendants in their official capacities.

§ 1983 Claims Based on the 1st, 5th, 9th and 14th Amendments

In addition to the Fourth Amendment, plaintiffs' § 1983 claims in Counts I and V also allege liability for violations of plaintiffs' rights under the First, Fifth, Ninth and Fourteenth Amendments. The Court agrees with defendants that plaintiffs have not pled facts which could support any liability under the First Amendment. Defendants also correctly point out that the Due Process Clause of the Fifth Amendment applies only to the federal government. *See, e.g., Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Court readily concludes as a

matter of law that the Ninth Amendment affords plaintiffs no distinct cause of action. For the foregoing reasons, the Court will grant all defendants summary judgment on Counts I and V to the extent that they assert claims based on the First, Fifth and Ninth Amendments.

The Court further concludes that all defendants are entitled to summary judgment on plaintiffs' Fourteenth Amendment claim for infringement of their right to privacy. In *Holman v. Central Arkansas Broadcasting Co., Inc.*, 610 F.2d 542 (8th Cir. 1979), the Eighth Circuit held that "no right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest." *Id.* at 544. In so holding, the Eighth Circuit cited *Paul v. Davis*, 424 U.S. 693, 712-13 (1976), in which the Supreme Court declined to enlarge the Fourteenth Amendment privacy protection to include a claim that the State may not publicize a record of an official act such as an arrest. More recently, the Eighth Circuit has held that the confidentiality interest which is secured by the Fourteenth Amendment is violated only where the information disclosed is "either a shocking degradation or an egregious humiliation . . . to further some specific state interest, or a flagrant breech of a pledge of confidentiality which was instrumental in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993). The facts of this case do not present such a scenario.

The intrusion into the privacy of the home in connection with the search is the focus of the constitutional deprivation alleged in this case, and that focus places the issue more squarely within a Fourth Amendment analysis. As the Second Circuit observed in *Ayeni*, 35 F.3d at 691, the Supreme Court has explained that where "the Fourth Amendment provides an explicit textual source of constitutional protection against [a particular sort] of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due proc-

ess,' must be the guide for analyzing those claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). For these reasons, the Court concludes that plaintiffs' Fourteenth Amendment claim is unavailing, and all defendants are entitled to summary judgment on Counts I and V to the extent that they assert a Fourteenth Amendment claim.

Supplemental Claims under Missouri Law

Counts II, IV, VI and VIII contain each plaintiff's state law tort claims for invasion of privacy, against the individual police officer defendants and against KSDK. Plaintiffs' motion for partial summary judgment indicates that plaintiffs pursue these claims on each of three different privacy theories under Missouri law: intrusion upon seclusion, public disclosure of private facts, and false light publicity. In addition to the plaintiffs' invocation of three distinct theories of tort liability, the state law claims potentially raise issues concerning defenses specifically available to the KSDK defendants as members of the press, and to the police defendants based on official immunity.

In view of the Court's disposition of the merits of the claims over which it has original jurisdiction, and in view of the novel and complex issues of state law presented on the facts of this case, the Court declines to exercise supplemental jurisdiction over the state law claims. The factors supporting this determination, as set forth above, are codified in 28 U.S.C. § 1367(c)(1) through (3). For all the foregoing reasons, the Court is persuaded that the state coures are the forum in which the contours of Missouri's privacy torts should be examined for potential application to the unique facts presented by plaintiffs' claims. The Court will therefore dismiss Counts II, IV, VI and VIII without prejudice to their being reasserted in state court.

Conclusion

Following the entry of partial summary judgment in plaintiffs' favor against defendants Boyer, Dell and Risk, the sole remaining question in this case is plaintiffs' damages on their Fourth Amendment claim. All other claims have been disposed of either by dismissal or by summary judgment in defendants' favor. The case remains set on the trial docket commencing November 6, 1995. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment [Doc. #46] is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant Multi-Media KSDK, Inc.'s motion for summary judgment [Doc. #49-1] is granted in part and denied in part, and its request for oral argument [Doc. #49-2] is denied as moot.

IT IS FURTHER ORDERED that the motion of defendants Clarke, Mischeaux, Padberg, Haar, Boyer, Dell, Richardson, Risk and Sloan to dismiss or in the alternative for summary judgment [Docs. #47-1 & #47-2] is granted in part and denied in part.

/s/ [Illegible]
United States District Judge

Dated: 10/31/95

[Filed Oct. 31, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

SANDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

PARTIAL SUMMARY JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED and DECREED that partial summary judgment on the issue of liability only is entered in favor of plaintiffs and against defendants Rodney Boyer, Dan Dell and Simon Risk, on the Fourth Amendment claim asserted by plaintiff Sandra Parker in Count I of the second amended complaint and by plaintiff Dana Parker in Count V. The issue of damages on these claims remains pending.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that in all other respects, summary judgment is entered in favor of defendants Anne-Marie Clarke, Charles E. Mischeaux, Matthew J. Padberg, Robert T. Haar, Rodney Boyer, Dan Dell, Joseph Richardson, Simon Risk, Terrence Sloan as to the remainder of Counts I and V.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of defendant Multi-Media KSDK, Inc. on Counts III and VII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the remaining counts of the second amended complaint, Counts II, IV, VI and VIII are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(1).

/s/ [Illegible]
United States District Judge

Dated: 10/31/95